ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
General Dynamics Ordnance and Tactical Systems, Inc.	)	ASBCA Nos. 56870, 56957
	)	
Under Contract No. W52P1J-05-G-0002	)	

APPEARANCES FOR THE APPELLANT:	David A. Churchill, Esq. Damien C. Specht, Esq. Jenner & Block Washington, DC
APPEARANCES FOR THE GOVERNMENT:	Craig S. Clarke, Esq. Army Chief Trial Attorney Peter F. Pontzer, Esq. Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTION TO STAY PROCEEDINGS

In these appeals under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, General Dynamics Ordnance and Tactical Systems, Inc. (appellant) seeks $18,193,894 to recover unanticipated costs based upon claimed inadequate government estimates of ammunition quantities under the subject contract. This contract was to serve as a "second source" to supply small caliber ammunition to the Army for a base year plus option years, in addition to the quantities furnished by the Army's primary supplier, Alliant Techsystems, Inc. (ATK).

Appellant sought the discovery of documents identified in the government's Rule 4 file as "Reserved-Possible Trade Secrets." On 22 October 2009, appellant filed a motion for entry of a protective order, seeking a limited disclosure of these documents. On 14 December 2009, the government filed an opposition to appellant's request for a protective order, objecting to the release of these documents in any manner, contending: (1) that the requested material is irrelevant to these appeals or not reasonably calculated to lead to admissible evidence; and (2) the requested material constitutes "trade secrets" under the Trade Secrets Act (TSA), 18 U.S.C. § 1905, and the government's disclosure of trade secrets under a protective order would violate the TSA.

Pursuant to Board order the parties briefed the issues, and the presiding judge reviewed the withheld documents, *in camera*. For the most part, these documents consisted of e-mails between government employees that referred to ATK unit prices and production capacity for specified rounds of ammunition at the government-owned, contractor-operated facility known as the "Lake City Army Ammunition Plant," or related to information from which this type of information could be derived.

On 1 June 2010, the presiding judge issued "Order on Appellant's Motion for Protective Order" (hereafter "the Order"), which granted appellant's motion for a protective order seeking a limited disclosure of the documents and concluded, *inter alia*, that the Board is authorized by the CDA and by the Board's Rules, duly published in the Code of Federal Regulations, to issue protective orders in connection with the disclosure of trade secrets or related confidential business information in Board appeals, and that any government disclosures made in response to such Board orders are authorized by law and do not violate the TSA. We incorporate the Order and attach it as an Appendix to this opinion.

By letter to the Board dated 7 June 2010, the government advised that it intended to appeal the Order and requested that the Board stay proceedings in the appeals pending resolution of the appeal by the Federal Circuit. Appellant filed in opposition to a stay on 10 June 2010. The government replied on 11 June 2010, reiterating, *inter alia*, its request for a stay of proceedings and also requesting that the Board certify the Order for appeal under 28 U.S.C. § 1292(b). By letter to the Board dated 23 June 2010, appellant contended, *inter alia*, that the Board does not have the authority to certify the Order for appeal under 28 U.S.C. § 1292(b). The government then responded with a brief four-sentence letter to the Board dated 24 June 2010, basically restating its previously asserted position, and closed with a request "that the Board either certify its June 1, 2010 order for appeal or reconsider[1] the requirement that Government disclose third party proprietary information [footnote omitted]."

[1] The government's intentions with respect to its 24 June 2010 letter are not clear. Clearly, the letter was filed to respond to appellant's letter dated 23 June 2010, and was not styled as a motion for reconsideration. One would imagine that if the government desired to file a motion for reconsideration it would do so in a clear and unequivocal manner. In any event, assuming *arguendo*, that this government letter could be construed as a motion for reconsideration, we note that it simply reargues the points previously raised and rejected by the Board, and we would deny the "motion" on this basis.

DECISION

I. CERTIFICATION OF INTERLOCUTORY BOARD ORDER FOR APPEAL UNDER 28 U.S.C. § 1292(b).

Title 28 U.S.C. § 1292(b) provides as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

We have held that the Board does not have the authority under this statutory provision to "certify" an interlocutory order for purposes of appeal to the Federal Circuit, since the statute expressly applies to district court judges. *Freightliner Corp.*, ASBCA No. 42982, 94-2 BCA ¶ 26,705.

Section 1292(b) provides that an appeal of an interlocutory order is "permissive," that is, it is subject to the discretion of the relevant court of appeals. It is therefore instructive to review the governing Rules of Practice of the Federal Circuit for insight into this procedure. "Rule 5. Appeal by Permission," provides for these types of appeals from a "trial court." "Rule 1. Scope of Rules; Title," defines "district court," "trial court," and the other entities over which the Court exercises appellate authority. Insofar as pertinent, Rule 1 provides as follows:

> **Rule 1. Scope of Rules; Title**
>
> **(a) Reference to District and Trial Courts and Agencies.**
>
> (1) the terms "district court" and "trial court" include:
>
> (A) the United States district courts;
>
> (B) the United States Court of International Trade;

(C) the United States Court of Federal Claims; and

(D) if applicable, the United States Court of Appeals for Veterans Claims.

(2) the term "agency" includes an administrative agency, board, commission, or officer of the United States, including each of the following:

(A) the Board of Patent Appeals and Interferences of the Patent and Trademark Office;

....

(I) the Boards of Contract Appeals in federal agencies;....

Clearly, the ASBCA is not a "trial court" or "district court" for purposes of the Court's rules and for permissive appeals. This supports our view that the permissive appeal procedure set forth in § 1292(b) is limited to district court judges. *See Shapiro v. Commissioner of Internal Revenue*, 632 F.2d 170 (2nd Cir. 1980) (appeal may not be taken under § 1292(b) from an interlocutory decision of the U.S. Tax Court since it is not a "district court").

We have reviewed the cases cited by the government, but none of them causes us to question our holding in *Freightliner*. We believe *Freightliner* remains good law and we reaffirm it. The Board does not have the authority to certify interlocutory orders for judicial review or appeal under 28 U.S.C. § 1292(b).

II. MOTION FOR STAY OF PROCEEDINGS

By letter to the Board dated 7 June 2010, the government advised that it "intends to appeal the Board's 1 June 2010 order" and "requests that the Board stay proceedings pending resolution by the Federal Circuit." The government failed to cite any authority to support its motion, nor did it provide any documentation to or from the Department of Justice that related to such an intended appeal. As of the date of this opinion, the Board has not received any appeal–related documentation from the government or from the Court.

A motion to stay proceedings is addressed to the discretion of a tribunal, which has the inherent authority to manage its docket and to stay or suspend proceedings in appropriate circumstances. In exercising our discretion, we must weigh the competing interests of the parties and assess any relevant prejudice. *Kaman Precision Products, Inc. formerly dba Kaman Dayron, Inc.*, ASBCA No. 56305 *et al.*, 2010 WL 2802406 (July 9, 2010) (collecting cases). We first assess the nature and extent of prejudice to appellant should this stay be granted.

In essence, the government's request for a stay of all Board proceedings pending resolution by the Federal Circuit seeks a stay of an uncertain and indefinite duration. Under the CDA, 41 U.S.C. § 607(e), appellant has the statutory right "to the fullest extent practicable" to the "informal, expeditious, and inexpensive resolution of disputes." Clearly, such an indefinite stay will materially delay the Board's proceedings and will impact appellant's statutory rights. In our view, this constitutes material prejudice.

The government asserts a colorable interest for a stay so as to obviate the need to choose between complying with the Order and risk criminal prosecution under the TSA (albeit an unlikely prospect), and refusing to comply with the Order and face sanctions. In any event, this asserted interest may be adequately addressed by a reasonable stay of the operation of the Order. The government fails to show any demonstrable need for a stay of all Board proceedings.

Having weighed the competing interests of the parties, we are of the view that the government, as moving party, has not made out a case for a stay of all Board proceedings pending resolution of any appeal to the Federal Circuit. On the other hand, we believe that a limited stay of the operation of the Order for 60 days is a reasonable accommodation of these interests. Such a stay will allow the government to continue to explore its avenues of judicial review without the need to act immediately on the Order and will not cause any material prejudice to appellant.

III. CONCLUSION

Having duly considered the government's motion to stay proceedings and appellant's opposition thereto, the Board concludes as follows:

1. The government's request that the Board certify its interlocutory order for appeal under 28 U.S.C. § 1292(b) is denied.

2. The government's motion to stay all proceedings pending resolution of any appeal to the Federal Circuit is denied.

3. The operation of the Board's 1 June 2010 Order is stayed for 60 days from the date of this Order. An extension of this stay may be granted for good cause shown.

Dated: 26 July 2010

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 56870, 56957, Appeals of General Dynamics Ordnance and Tactical Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals

Appendix: Order on Appellant's Motion for Protective Order, dated 1 June 2010